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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 20

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

SIDNEY J. WATTS,
Counsel for Petitioner.

FRED C. HOUSTON,
Of Counsel.

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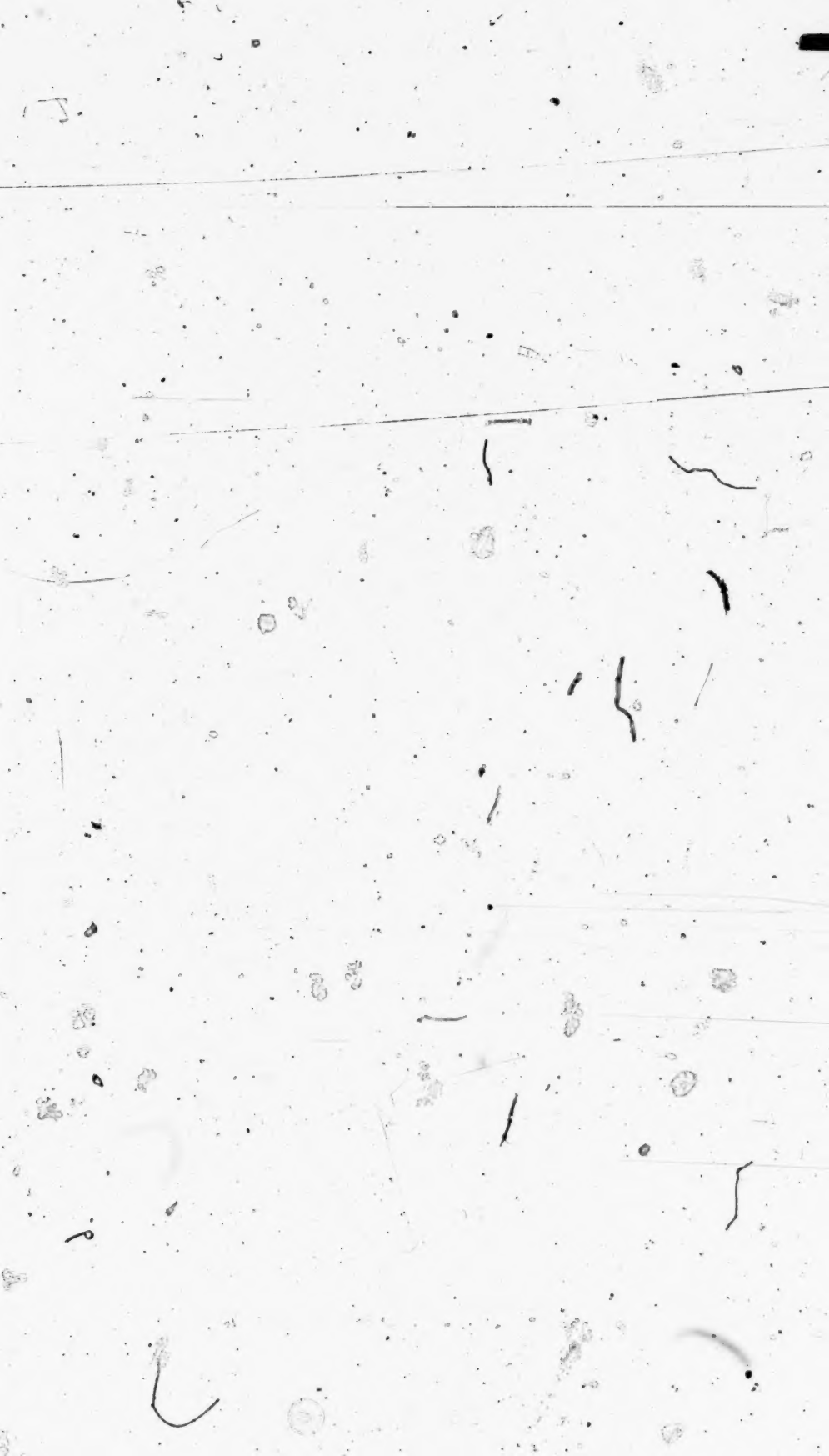

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 668

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

To the Honorable, Harlan Fiske Stone, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, William F. Esenwein, by his counsel, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Pennsylvania, being the highest court of the said State, in the above entitled action, the opinion and decision of said Court having been rendered and filed January 3, 1944 (R. 62); by which said decision the said Court held that petitioner was not entitled, upon the basis of a divorce decree obtained by him in Clark County, Nevada, to a release from an order requiring him to support respondent as his wife.

Questions Involved.

Was petitioner deprived of a right guaranteed him by Article IV, Sec. 1 of the federal constitution by the action of the Supreme Court of Pennsylvania in the decision aforesaid, whereby his divorce decree, rendered by the Nevada Court and properly authenticated pursuant to the Act of Congress, was disregarded and held legally insufficient to sever in Pennsylvania the relationship of man and wife between petitioner and respondent, it being conceded that in Pennsylvania the duty to support ceases with the termination of the marriage relationship?

Statement of Case.

Petitioner and respondent were married in Pennsylvania and lived there prior to and after their separation in the year 1919 until the summer of 1941, when petitioner left Pennsylvania and removed to Nevada. He has not since returned to Pennsylvania. He is at present a resident of Ohio.

In 1922 respondent obtained a support order in the County Court of Allegheny County, Pennsylvania, with which, as modified from time to time, petitioner complied until shortly after December 8, 1942, when he presented his petition praying for a total release from said order, on the ground that he had been divorced from respondent by the Eighth Judicial District Court of Clark County, Nevada on September 8, 1941 and that, in view of the decision of the Supreme Court of the United States in *Williams* v. *North Carolina*, 317 U. S. 287, 63 S. Ct. 207, he was no longer required to concede that the rule of *Haddock* v. *Haddock*, 201 U. S. 562, applied to his situation as a defendant in the aforesaid support proceeding.

After hearing, his petition was refused (R. 48). Upon appeal to the Superior Court of Pennsylvania the order

of the County Court was affirmed July 16, 1943, 153 Super. 69, 33 A. 2d 675 (R. 56). Petitioner's Application for Allocatur was allowed by the Supreme Court of Pennsylvania by order, dated August 12, 1943 (R. 57). After argument, the order of the Superior Court was affirmed, Mr. Justice Linn writing the opinion for the majority of four justices and Mr. Justice Drew writing a dissenting opinion in which Chief Justice Maxey concurred (R. 59).

The opinions of the said courts are set forth in the record which accompanies this petition (R. 51, 59, 63).

At the original hearing in the said County Court petitioner rested his case for release from the support order substantially upon his divorce proceeding, properly authenticated. Respondent in opposition thereto relied upon what was shown in the exemplification, namely, that petitioner had taken up a residence in Las Vegas, Nevada in June, 1941 and that he had been divorced there by a decree dated Sept. 8, 1941. By reference to a deposition previously given by petitioner in another stage of the support proceedings, it was then shown by respondent that "some time" in October, 1941 petitioner was a resident of Cleveland, Ohio and had remained such to the time of trial (R. 42). Reference to the official Pennsylvania reports was also made to show that petitioner had twice been denied a divorce from the respondent in Pennsylvania, once in 1933 and again in 1940. Neither party testified in person.

Reasons for the Allowance of the Writ.

(1) It is respectfully suggested that the writ prayed for should be issued in order that, by affording petitioner the relief to which he is entitled under what his counsel deem to be the necessary consequence of the rule of law as announced in *Williams v. North Carolina, supra*, the marital status and resulting rights and obligations of innumerable

other parties, similarly situated, will be definitely settled by this Court as "the final arbiter" of the question whether a decision such as that here sought to be reviewed is "a permissible limitation on the full faith and credit clause". (317 U. S. 302).

(2) The Pennsylvania Supreme Court has decided a federal question of substance in a way not in accord with the applicable decisions of this Court. This question was raised and relied upon by petitioner in the courts below (R. 10, 34, 56). It was presented also to the Superior Court. (See Appendix to this petition.)

The Importance of the Question.

Clarification and extension of the rule of the *Williams* case appears to be necessary in the public interest. In support of the existence and urgency of such necessity, we refer not only to the division of opinion which existed among the six justices of the Supreme Court of Pennsylvania in the instant case, but also to a similar diversity of opinion in two other recent appellate court cases; *Stephens* v. *Stephens*, 181 App. Div. 49 N. E. 2d 560; and *In re Holmes Est.*, New York Court of Appeals, November 24, 1943, the latter case being a four to three decision with Chief Judge Lehman writing the opinion for the majority. More serious still is the circumstance that the aforesaid decisions of the highest courts of the States of New York and Pennsylvania are irreconcilable. The many law review articles which have appeared during the last year reflect a similar lack of uniformity of interpretation and add to, rather than lighten, the burden of bench and bar in attempting to apply the *Williams* case.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of your Honorable Court directed to the Supreme Court of Penn-

sylvania, commanding that court to certify and send to your Honorable Court for review and determination on a day certain therein to be named, a full and complete transcript of the record of all proceedings in the case numbered and entered on its docket No. 5 March Term, 1944, entitled: Commonwealth Ex. Rel. May H. Esenwein v. William F. Esenwein, Appellant, and that the judgment of said court entered January 3, 1944 be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as to your Honorable court may seem meet and just.

Respectfully submitted,

SIDNEY J. WATTS,
Attorney for Petitioner.

FRED. C. HOUSTON,
Of Counsel.

APPENDIX TO PETITION FOR CERTIORARI.

(Questions Presented to Superior Court of Pennsylvania.)

STATEMENT OF QUESTIONS INVOLVED.

1. Did the action of the Supreme Court of the United States on December 21, 1942 in overruling *Haddock vs. Haddock* constitute such a change in the conditions and circumstances of the parties to this litigation, occurring after the entry by the Court below of an order of support (the legality of which was dependent upon the rule of *Haddock vs. Haddock*), as to entitle appellant-husband to a revocation of said order, when the application for said revocation was made, and this appeal from the refusal thereof was taken, within the time allowed for an appeal from the original order of support? *Negatived.*

2. Was the Court below obliged to accord full faith and credit to the decree in divorce rendered by the Nevada court, of which a duly certified exemplification was tendered to the Court below, in the absence of any proof which challenged the jurisdiction of said court to enter said decree? *Negatived.*

3. Was the Court below warranted in refusing to accord full faith and credit to the decree of the Nevada court for the single reason assigned by the Court below, namely, that the Pennsylvania courts had previously refused appellant-husband a divorce? *Affirmed.*

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of Judge Gunther of the County Court of Allegheny County, Pennsylvania appears at page 49a of the Record as tendered to the Supreme Court of Pennsylvania. The opinion of Judge Kenworthey of the Superior Court is reported in 153 Pa. Super. 69, 33 A. 2d 675. The majority and minority opinions of the Pennsylvania Supreme Court are not yet reported. The aforesaid appellate court opinions are printed in the record filed in this Court.

Jurisdiction.

The jurisdiction to issue the writ is found in 28 U. S. C. A. 344(b), Jud. Code §237(b), as amended.

Argument.

We believe that the dissenting opinion in the instant case and the majority opinion of Chief Judge Lehman in the *Holmes* case set forth adequate reasons for the allowance of the writ. Accordingly we do not burden this Brief with a recital of the authorities and contentions upon which we relied in the Pennsylvania courts.

Our view is that as the result of the *Williams* case *Bell* v. *Bell*, 181 U. S. 175, *Streitwolf* v. *Streitwolf*, 181 U. S. 179 and *Andrews* v. *Andrews*, 188 U. S. 14 are definitely shattered as present day authorities. However, even if they are still authorities, they do not support the decision which we here seek to have reviewed.

We are definitely taken aback by the manner in which alleged statements by counsel arguendo are attempted to be relied on in this case by both the Superior and the Supreme Courts of Pennsylvania to supplement the fact picture de-

veloped at the trial in the County Court. Such oral statements were not reported or reduced to writing. We assume, without admitting, that we are bound here by this unusual procedure. Even so, that a domicile of choice cannot be acquired by residence in a hotel is, in our opinion, an unsupportable contention. That a domicile so acquired may not be terminated at any time, i. e., immediately upon the happening of the reasons occasioning the decision, is equally unsupportable. But in any event, such speculations or assumptions, not supported by anything in the printed record, are no solid ground or reason for striking down the decree of a court of a sister state entered in what was admittedly "a judicial proceeding". It is important, perhaps, that the majority opinion of the Supreme Court of Pennsylvania makes no reference to other matters of far greater significance which were developed at the oral argument in that court, which related to the finality of the manner of petitioner's removal from Pennsylvania and to his subsequent remarriage upon the faith of his Nevada divorce.

The evidence before the Nevada court was properly put in evidence as an essential part of the "judicial proceedings", which by the constitutional provision were entitled to full faith and credit. What right had the Pennsylvania Supreme Court to assume that the Nevada court would have opened and set aside its decree upon a showing of everything referred to and relied upon in the majority opinion, including such evidence, if the respondent had applied to that court for the entry of such an order and upon such grounds, or that this Court would have convicted the Nevada court of error for not doing so? And unless such matters were sufficient in the Nevada court to invalidate the decree, then the decree, being valid there, is valid in every other state. If the actual result in the *Williams* case does not require that conclusion, we are unable to appraise its value as a precedent. If the decision in the instant

case is allowed to stand and to furnish a precedent in countless similar cases, it seems to us that the *Williams* case is reduced to a mere quixotic jousting with the windmill of *Haddock v. Haddock*, and that, in spite of the reversal of their convictions, the Williams and Hendrix spouses are not only still subject to the charges of bigamy, but that they have no reliable defenses to those charges. Our latest information is that after a retrial in the Superior Court of Caldwell County, North Carolina they have been sentenced to the State Penitentiary and have given notice of appeal to the State Supreme Court.

Conclusion.

In fairness to petitioner and to suitors, counsel and judges in all the forty-eight states of the Union, the questions raised by this application should be set at rest by this Court.

Respectfully submitted,

SIDNEY J. WATTS,
Attorney for Petitioner.

FRED C. HOUSTON,
Of Counsel.

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